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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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Recent decisions in the Fourth and Fifth Circuits concerning the application of the exhaustion of administrative remedies doctrine are in direct conflict with the decision below.

Petitioner respectfully brings to the Court's attention two recent circuit court decisions. *United States* v. *Davila*, —— F.2d ——, 3 SSLR 3089 (5th Cir., July 1, 1970), although decided before the filing on July 6, 1970 of the petition in this case, was still not reported at that time. *United States of America* v. *Eades*, —— F.2d —— (4th Cir., August 5, 1970), was decided after the filing of the petition.

Both cases held the application of the exhaustion requirement inappropriate where the local board, because of an erroneous view of the law, and on an undisputed set of facts, has acted without a basis in fact by denying a

conscientious objector classification for which a registrant has made out a prima facie case. The majority below rejected this position.

In *Eades,* the registrant's conviction for failure to submit to induction was reversed. The court stated that the registrant made a prima facie case for conscientious objector status and that his failure to exhaust administrative remedies was no bar to raising his defense of invalid classification. In effect, the court said that the district court should have determined whether a basis in fact existed for the registrant's classification, whether or not the registrant had appealed his classification through the administrative process.

In *Davila,* the registrant's conviction for refusal to submit to induction was also reversed. The court stated that the registrant had presented a prima facie case for conscientious objector status and that his local board had acted without a basis in fact in denying his claim. In answer to the Government's argument that the court could not reach the issue of basis in fact because the registrant had failed to exhaust his administrative remedies, the court, citing *McKart* v. *United States,* 395 U.S. 185 (1969), stated that the exhaustion requirement was no longer an absolute bar to judicial review.

The court then cited the Supreme Court's disposition of the petition for certiorari in *United States* v. *McNeil,* 395 U.S. 463 (1969), a case cited in the instant petition.

> "The Supreme Court left open the possibility that a defense of wrongful failure to grant conscientious objector status might not be barred for failure to exhaust in an appropriate case, even though the registrant's

claim is in a category which requires the exercise of discretion by the Selective Service System. On the same day it decided *McKart*, it vacated the judgment in United States v. McNeil, 401 F.2d 527 (4th Cir. 1968) and remanded to the District Court for further consideration in the light of *McKart*. 395 U.S. 463, 23 L.Ed. 2d 446 (1969). The Court of Appeals had held that McNeil was exhaustion-barred from questioning in the trial Court the denial of his claims for conscientious objector and ministerial exemptions." *United States* v. *Davila*, 3 SSLR at 3091, n. 4.

The court also noted that an appeal board can bring no special expertise to bear on the question of whether or not a registrant has made out a prima facie case for conscientious objector classification where his file reveals no facts refuting his conscientious objection claim and that judicial review in such cases would not disrupt the administrative process.

As all three judges below agreed, there was no basis in fact for the denial of petitioner's claim for exemption as a conscientious objector.

In light of the decisions in *Eades* and *Davila*, the exhaustion rule should not be applied to petitioner to prevent judicial review of the legality of his classification and denial of conscientious objector status.

CONCLUSION

Certiorari should be granted because the decision below is in clear conflict with decisions of the Fourth and Fifth Circuits.

Respectfully submitted,

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